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Supreme Court of the United States

OCTOBER TERM, 1948

No. 52

INGRAM M. STAINBACK, Governor of the Territory of Hawaii, WALTER D. ACKERMAN, JR., Attorney General of the Territory of Hawaii, and W. H. LOPER, Superintendent of Public Instruction of the Territory of Hawaii,

Appellants,

vs.

MO HOCK KE LOK PO, an Eleemosynary Corporation, DAI KUNG CHINESE SCHOOL, an Eleemosynary Corporation, et al.

APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE DISTRICT OF HAWAII

BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

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BRIEF OF THE AMERICAN JEWISH CONGRESS, *AMICUS CURIAE*

Interest of the American Jewish Congress

The American Jewish Congress was organized " . . . to help secure and maintain equality of opportunity . . . and to safeguard the civil, political, economic and religious rights of Jews everywhere" and ". . . to help preserve, maintain and extend the democratic way of life." Con-

sistent with these purposes we have, within the past year, joined in the submission of a brief amicus curiae to this Court in *People ex rel. McCollum* v. *Board of Education*[1] in which we argued the constitutional invalidity of religious teaching in the public schools. We there urged that political liberty and religious freedom could remain inviolate only when there was no intrusion of secular authority in religious affairs or of religious authority in secular affairs. The continued separation of church and state, we argued, was an indispensable requisite of religious liberty as envisaged by the framers of the First Amendment.

In the *McCollum* case, the guaranty of religious freedom was being challenged by the extension of state aid to religious teaching through the use of the public school system and facilities for religious instruction. The case now before this Court presents another attack on religious freedom, namely that of state interference with religious instruction. That attack we regard as equally unconstitutional. For, the Constitution which prohibits state aid to religious teaching prohibits as well state interference with such teaching.[2]

In our brief in the *McCollum* case we stressed the sacred responsibility which has always been attached to religious instruction in Jewish history and tradition.[3] The over-

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[1] Brief of Synagogue Council of America and National Community Relations Advisory Council in *People of the State of Illinois ex rel. Vashti McCollum* v. *Board of Education, Champaign, Ill.*, October Term 1947, No. 90.

[2] We pointed out in our brief in the *McCollum* case that some of the teaching in Christian religious classes, particularly those of Jewish participation in the crucifixion, had a particularly harmful effect upon inter-religious relationships. Nevertheless, we argued that the state has no constitutional authority to exercise control over the content of religious instruction in church schools conducted independently of the public school system. We stated that the friction and disharmony resulting from such instruction is part of the price we willingly pay for religious liberty. *Ibid.* pp. 4-5.

[3] *Ibid.* p. 5.

whelming majority of Jewish children receive religious instruction in after-hour or Sunday schools.[4] Since promotion of religious education is one of the important aspects of our organizational activity, we have consistently striven for the extension of these programs to include those at present not receiving such education. The statute before the Court in this case would make it illegal for these religious schools to teach the Bible to children in the original Hebrew tongue.[5] We would, therefore, be remiss in our duty of fostering religious instruction if we did not present to this Court our view that the statute constitutes a grave attack upon religious liberty.

Our interest in this case, however, is not limited to the challenge to religious liberty it presents, grave as that challenge is. Even if the present statute exempted religious schools, we should nevertheless contest its validity because we believe it to be utterly inconsistent both with the fundamental principles and the constitutional concepts of our American democracy. The Hawaiian legislature which enacted this statute was not motivated by any anti-religious considerations. It sought, as has repeatedly and futilely been attempted elsewhere, to achieve a monolithic cultural uniformity by governmental compulsion. The richness and promise of American culture lies in its diversity.[6] The glory of the American contribution to civilization has been the manner in which it has welcomed the heritages of many

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[4] At least three out of every four Jewish children in the United States receive religious education at some time during their childhood. Jewish Education Association of New York, *Twenty-Five Years of Jewish Education in the United States*, American Year Book (1936-1937) 104; Hurwich, *Religious Education and the Release Time Plan*, Jewish Education (1941) 103-107.

[5] Unlike the similarly motivated statute invalidated in *Farrington v. Tokushige*, 273 U. S. 284 (1927), the present statute does not exempt "Sabbath schools."

[6] Adamic, *A Nation of Nations*, 6-13; Kallen, *Culture and Democracy in the United States*, p. 61; Cole and Vickery, *Intercultural Education in American Schools*, p. 50; Brown and Roucek, *One America*, p. 501 *et seq.*

lands, peoples and traditions and blended them, in all their diversities, into the multi-faceted pattern of American culture, rather than destroying them by imprisonment in the strait-jacket of a monolithic nationalism. Any attempt to impose a rigid cultural uniformity by thwarting the development of the various cultural traditions out of which the American pattern has been woven violates and is alien to the basic principles of American democracy. We would oppose all such attempts, no matter what particular means might be used to achieve that un-American end. If purely voluntary means are employed, the ideals of American democracy are being subverted. When the goal is sought through compulsion, as in the case now before this Court, constitutional rights are infringed as well. Forced conformity to the cultural patterns of the majority ethnic group is an integral part of the fascist or totalitarian process[7] and it is successfully achieved only in the graveyard.[8]

Attempts to outlaw foreign language teaching seem to rest on the assumption that there is some necessary relationship between language and the ideals or concepts that language conveys. Yet, every student of American history knows that most demagogues who have attempted, both in speech and in writing, to destroy American democracy and to sow the seeds of discord and race hatred, have used the English language faultlessly and frequently eloquently; while many of the noblest utterances ever made in this country, most expressive of its democratic ideals and aspirations, have been spoken or written in languages other than English or in imperfect English.

For these reasons and with the consent of the parties we respectfully submit this brief amicus curiae.

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[7] MacIver, *The More Perfect Union*, p. 9.

[8] *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 641 (1943).

Statement of the Case

This appeal is brought by the Governor, Attorney-General and Superintendent of Public Instruction of the Territory of Hawaii from a judgment entered in the District Court of the United States for the District of Hawaii on February 13th, 1948 (R. 591). The appellees, eleemosynary corporations organized for the sole purpose of conducting schools in Hawaii for the education of children in the Chinese language (R. 4), brought suit against appellants for judgment declaring the invalidity and enjoining enforcement of a Territorial statute, more fully described below, regulating and restricting instruction of children in any foreign language (R. 10-11).[9] After trial, the District Court unanimously[10] adjudged that the statute violated the due process clause of the Fifth Amendment and ordered the issuance of the injunction prayed for (R. 87).

The Statute

The statute[11] attacked in this suit was enacted on May 1, 1943. It declares, as a legislative finding, that:

". . . the study and persistent use of foreign languages by children of average intelligence in their

[9] Two parents of children in the Hawaiian public schools joined in the suit, but failed to allege that they possessed an interest in the matter in controversy exceeding $3,000. The District Court, *sua sponte*, ruled that such an allegation was required by 28 U. S. C. 41 (1) (1946 ed.), and that 28 U. S. C. 41 (14) (1946 ed.), which does not require allegation of the jurisdictional amount in suits to redress deprivation of civil rights under color of any law "of any *State*" does not apply to Territories. The Court accordingly dismissed the complaint as to these plaintiffs. R. 78-79.

[10] One of the judges dissented as to the applicability of the three judge procedure prescribed in Section 266 of the Judicial Code (28 U. S. C. 380), but nevertheless participated in the determination on the merits.

[11] Act 104 of the Hawaiian Legislature, now embodied in Hawaiian Rev. Law, 1945, Chapter 31. The text of the statute is set forth in the Transcript of Record at pp. 11-14.

early and formative years definitely detract from their ability properly to understand and assimilate their normal studies in the English language, which are required by law to be pursued by all children of school age, and definitely retard their progress in understanding and assimilating such studies; that the study and persistent use of such foreign languages in such early and formative years may and do, in many cases, cause serious emotional disturbances, conflicts and maladjustments; that the teaching of foreign languages compels and encourages the study and persistent use of such foreign languages, to the detriment, as aforesaid, of children in their early and formative years; that it is to the best interest, and will best promote the health and welfare, of children of tender age that such foreign language studies not be undertaken until each child shall have completed and passed at least the fourth grade or shall have attained the age of nine years, unless such child is earlier able to speak, write and read the English language and has attained a test score of at least 5.0 on standard tests in composition and in reading; and that the teaching and study of foreign language to and including the eighth grade or the age of fifteen years should be regulated in the public interest to avoid the detrimental results herein set forth to which end each of the provisions of this chapter are enacted" (Section 1).

It defines a "school" as:

"'School' means any person, firm, group of persons, unincorporated association, corporation, establishment, or institution, which teaches, with or without fees, compensation or other charges therefor, any language other than the English language, as a course of study, to two or more persons as a group, as a regular and customary practice" (Section 2).

The statute then provides:

"No child shall be taught a foreign language in any school unless he shall comply with one of the following requirements: (a) That he shall have passed the fourth

grade in public school or its equivalent, and shall pass from time to time in each succeeding grade a standard test in English composition and reading conducted by or under the direction of the department of public instruction attaining a score not lower than normal for his grade; or (b) that he shall have passed the eighth grade in public school or its equivalent; or (c) that he shall have attained the age of fifteen years" (Section 3).

Since most Hawaiian children enter the first grade when they reach the age of six, the Court below construed this section as in effect prohibiting the teaching of a foreign language to children under ten (R. 79). The statute also prohibits any school from permitting the teaching of any foreign language to any child under fifteen by a teacher not previously examined and certified by a board to "be well versed in the usage and idiom of both the English language and the foreign language to be taught" (Section 4). It provides for visitation by the department of public instruction (Section 5) and for injunctive enforcement of its provisions (Section 6).

The Issue

The issue to which this brief is addressed is whether the challenged Hawaiian statute unconstitutionally abridges freedom of religion. This issue turns upon whether the statute in fact restricts religious liberty and, if it does, whether the restriction is necessary to prevent grave and immediate danger to interests which the territorial legislature may lawfully protect.

The Court below invalidated the statute on the ground that it violated the due process clause of the Fifth Amendment (R. 87) without mentioning the First Amendment. In this the Court apparently followed *Farrington* v.

Tokushige.[12] It may have felt constrained to do this by reason of the fact that the plaintiffs did not in their complaint refer specifically to the First Amendment. Since the Court recognized the existence of a religious liberty issue,[13] we believe that it could well have expressly decided that issue. Nor is it material that the Court found it necessary to dismiss the complaint in respect to the parent plaintiffs; the preacher and teacher of religion, no less than the disciple, is protected by the First Amendment,[14] and

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[12] 273 U. S. 284, 289 (1927). It should be noted, however, that the statute in the *Farrington* case expressly exempted "Sabbath schools" (p. 291), whereas no such exemption is contained in the statute involved in the instant case. Moreover, the *Farrington* case followed *Meyer* v. *Nebraska*, 262 U. S. 390 (1923), and *Bartels* v. *Iowa*, 262 U. S. 404 (1923), both decided under the Fourteenth Amendment at a time when it was not fully realized that the religious liberty guaranty of the First Amendment was impliedly incorporated in the Fourteenth. Cf. *Prudential Insurance Co.* v. *Cheek*, 259 U. S. 530 (1922); as a result, this Court was unfortunately required to invalidate a statute prohibiting parochial schools on the ground that the conduct of such schools is a business and property entitled to constitutional protection against deprivation without due process of law. *Pierce* v. *Society of Sisters*, 268 U. S. 510, 535 (1925).

[13] "Assuming this true, it [the statute] would apply to a religious Chinese descended mother having an educated cousin teach two of her children in her home the truths of Confucius, even orally, explaining the words of that spiritual guide in the language in which they are spoken and are recorded" (R. 80). "There are many Hawaiian Catholic parochial schools with complete educational courses, attendance in which is equivalent to that of the regular public schools" (R. 85).

[14] *Taylor* v. *Mississippi*, 319 U. S. 583 (1943); *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940); *Schneider* v. *New Jersey*, 308 U. S. 147 (1939); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Marsh* v. *Alabama*, 326 U. S. 501 (1946). Cf. Virginia Statute of Religious Liberty (XII Henning, Statutes of Virginia, 84): "Be it enacted by the General Assembly, that . . . all men shall be free to profess and by argument to maintain, their opinion in matters of religion. . . ." Cf. also Mr. Justice Harlan's dissenting opinion in *Berea College* v. *Kentucky*, 211 U. S. 45, 67 (1908): "The capacity to impart instruction to others is given by the Almighty for beneficial purposes and its use may not be forbidden or interfered with by government—certainly not unless such instruction is, in its nature, harmful to the public morals or imperils the public safety."

the decision could therefore have been based on the religious liberty guaranty even though the only remaining plaintiffs were schools. Probably omission of reference to the First Amendment can be explained in part by the Court's determination that plaintiffs were required to prove that the matter in controversy exceeds $3,000, and by the difficulty of translating interference with the exercise of religious liberty into monetary values.

Whatever the reason for the omission of reference to the First Amendment, we submit that the issue of religious liberty is an integral and inseparable part of the determination of the Court below and of the issue before the Court. There can be little doubt of the legislature's power to regulate business enterprises,[15] even educational business enterprises.[16] Constitutional limitations are transgressed only when the legislature's action is arbitrary or unreasonable.[17] In determining whether the Hawaiian statute is arbitrary and unreasonable, this Court must consider whether it prohibits the free exercise of religion in violation of the First Amendment. It is now well established that legislation which prohibits the free exercise of religion effects a deprivation without due process of law in violation of the Fourteenth Amendment.[18] It is no less a deprivation under the Fifth.[19] We submit that if the Hawaiian statute is vulnerable to direct attack under the First Amendment, it cannot be sustained under the Fifth.

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[15] *North American Co.* v. *S. E. C.*, 327 U. S. 686 (1946); *Mulford* v. *Smith*, 307 U. S. 38 (1939); *Currin* v. *Wallace*, 306 U. S. 1 (1939).

[16] *Zucht* v. *King*, 260 U. S. 174 (1922); *People* v. *Am. Socialist Soc.*, 202 N. Y. App. Div. 640 (1922).

[17] See note 15 *supra*. See also *Farrington* v. *Tokushige*, 273 U. S. 284 (1927); *Meyer* v. *Nebraska*, 262 U. S. 390, 403 (1923).

[18] *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943); *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Marsh* v. *Alabama*, 326 U. S. 501 (1946).

[19] Cf. *United States* v. *Korner*, 56 F. Supp. 242 (1944).

This, in essence, was the theory upon which *Meyer* v. *Nebraska*,[20] *Bartels* v. *Iowa*,[21] and *Pierce* v. *Society of Sisters*[22] were in substantial part based. The statutes in those cases were adjudged to be arbitrary and unreasonable interference with the conduct of educational institutions because they restricted "the liberty of parents and guardians to direct the upbringing and education of children under their control".[23]

In any event, whatever the theory upon which the decision of the Court below was based, there can be no doubt of this Court's power to affirm that decision on the ground that the statute violates the religious liberty guaranty of the First Amendment.[24]

Framing the issue in terms of religious liberty rather than regulation of business requires this Court to adopt a stricter standard of permissible legislative action. As this Court said in *West Virginia State Board of Education* v. *Barnette*:

> "The right of a State to regulate, for example, a public utility may well include, so far as the due process test is concerned, power to impose all of the restrictions which a legislature may have a 'rational basis' for adopting. But freedoms of speech and of press, of assembly and of worship may not be infringed on such slender grounds. They are susceptible of restriction only to prevent grave and immediate danger to interests which the state may lawfully protect."[25]

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[20] 262 U. S. 390 (1923).
[21] 262 U. S. 404 (1923).
[22] 268 U. S. 510 (1925).
[23] *Pierce* case, 268 U. S. 510, 534 (1925).

[24] *Helvering* v. *Gowran*, 302 U. S. 238, 245 (1937): "In the review of judicial proceedings the rule is settled that, if the decision below is correct, it must be affirmed although the lower courts relied upon a wrong reason." *White* v. *Higgins*, 116 F. 2d 312, 318 (1940): "An Appellee may urge, or the Appellate Court may consider, any theory, argument or reason in support of a decision of a lower tribunal whether or not such theory, argument or reason was relied upon or even considered by or suggested to the court below."

[25] 319 U. S. 624, 639 (1943)

We therefore submit the issue to this Court in these terms: Does the Hawaiian statute restrict religious liberty, and if it does, is the restriction necessary to prevent grave and immediate danger to interests which the territorial legislature may lawfully protect?

Summary of Argument

The Hawaiian statute limits the free exercise of religion since, under its terms, teaching of the Bible and prayers in the Biblical tongue as prescribed by the Jewish religion is prohibited. Such prohibition is constitutionally justified only if clearly and immediately necessary to protect an interest more important to democratic society than the unrestricted exercise of religion.

The interest which the Hawaiian legislature purported to protect is the prevention of interference with the understanding and assimilation of studies in the English language. But proof is lacking that the restrictive legislation here in issue is clearly and immediately necessary for that purpose. Moreover, in balancing the conflicting interests, the Court must accord to the free exercise of religion the preferred status intended by the framers of the First Amendment and may sanction infringement only where the protected interest is of manifestly superior importance. Measured by that test, we submit that, even if enactment of the statute were the only means of protecting this interest, the interest is subordinate in importance to the free exercise of religion.

Finally, a study of the legislative history of this and similar statutes establishes clearly that its real purpose is to coerce cultural monism. Such an aim, being inconsistent with our democratic ideals and national policy, is equally insufficient to justify interference with the free exercise of religion.

POINT I

The Hawaiian statute unconstitutionally restricts religious liberty, since the statute is not clearly and immediately necessary to protect an interest more important to democratic society than the free exercise of religion.

I. The Hawaiian statute restricts religious liberty.

The Hawaiian statute by prohibiting the teaching of a foreign language to children before they have passed the first four grades of school, in effect prohibits the teaching of a foreign language to all children before they reach the age of ten (R. 79). In addition, the statute prohibits the teaching of foreign languages to "below average" children until they reach the age of fifteen (R. 80). The Court below found only the first part unconstitutional (R. 85) but invalidated the entire statute, notwithstanding its saving clause, on the ground that its provisions are not divisible (R. 86).[26]

As we have pointed out, the statute here in issue does not exempt religious schools (as did the statute invalidated in the *Farrington* case)[27] nor does it (as did the statute invalidated in the *Meyer* case)[28] exclude "the so-called

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[26] We believe that the court below was in error in suggesting that the statute would be constitutional if limited to "below average" children. No doubt, a statute so limited would appear valid if no issue of religious liberty were involved, and the only question were its reasonableness in the light of legislative findings. With the question of religious liberty present, however, a contrary result must be reached. The Constitutional protection of religious liberty is not limited to persons of average or over-average intelligence. Nevertheless, it is sufficient for the purpose of this case to confine our discussion to that aspect of the statute which, in effect, prohibits the teaching of a foreign language to any child who has not reached ten years of age.

[27] 273 U. S. 284, 291 (1927).

[28] 262 U. S. 390, 400 (1923).

ancient or dead languages".[29] Hence, even if Biblical Hebrew could still be termed an ancient language[30] (and the modern revival and use of Hebrew renders such an assumption untenable), it is clear that the restrictions imposed by the statute in the present case apply to the teaching of Hebrew in Jewish religious schools.

There can be little doubt that a statute which prohibits the teaching of Biblical Hebrew to Jewish children under ten years of age[31] restricts the religious liberty of the children, their parents and teachers.

Following the Biblical command "thou shalt teach them diligently to thy children",[32] the Rabbis, whose teachings are embodied in the Talmud, ordained that every child should begin study of the Bible in the Hebrew tongue at the age of five.[33] Even before the child reaches that age and as soon as he is able to speak, Jewish religion requires his father to teach him the meaning of simple prayers.[34]

When the Jewish child reaches five, he must be taught to read and understand Hebrew so that he may learn to recite and understand his prayers.[35] When he reaches the

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[29] See opinion below (R. 85): "The defendants state the Act interdicts the teaching of even Latin or Greek . . . and we agree."

[30] It was so designated in the *Meyer* case: 262 U. S. 390, 400 (1923).

[31] While the statute presumably permits teaching a foreign language to one child at a time (Sec. 1872), we do not think it unfair to say that the practical effect of the statute is to prohibit all foreign language instruction. In any event, as is indicated in the text, the Jewish religion prescribes *school* teaching.

[32] Deuteronomy 6, 7.

[33] Ethics of the Fathers, Chapter 5, Mishnah 21, in The Mishnah, Danby Translation, p. 458; V Jewish Encyclopedia 43.

[34] Maimonides, *Mishneh Torah* (Repetition of the Law), Ch. 1, paragraph 6: "Every father is obligated to teach his child Torah. When the child begins to speak, he must teach him the words 'The Law which Moses commanded us is the inheritance of the Congregation of Jacob', and 'Hear, O Israel, the Lord is our God, the Lord is one.' Thereafter, he must teach him sentence by sentence, in accordance with his physical and mental development, until the child reaches six or seven, when he must be brought to a teacher."

[35] Tractate Sukkoh (Babylonian Talmud) 42a; Shulchon Aruch, Jire Draf (compiled by Joseph Caro and Moses Isserles); Ch. 245, sections 5, 8, Maimonides, *supra*, note 34.

age of six or seven, depending upon his physical and mental development, the Jewish religion requires that his education be transferred to schools, communally or privately conducted.[36] Accordingly, about the year 60, High Priest Joshua ben Gamala decreed that every community, no matter how small, must conduct an elementary school to receive and educate all children of six years and over.[37] Since that time religious education of Jewish children has always been a communal as well as parental responsibility[38] and attendance of children at religious schools a parental obligation.[39]

Since we are submitting this brief in behalf of the substantial portion of the Jewish community which we represent, we have emphasized that the statute in issue restricts the free exercise of religion on the part of Jews.[40] It is immaterial that the record does not disclose the existence of a Jewish community or Jewish religious schools in

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[36] Maimonides, *supra*, note 34, Ch. II, paragraph 2; Shulchon Aruch, Jire Deah, *supra*, note 35, Ch. 245, section 8; Moses of Coucy, Great Book of Commandments, Part 2, paragraph 12.

[37] Tractate Baba Bathra (Babylonian Talmud) 21a; 2 Graetz, *History of the Jewish People*, 249; Grayzel, *History of the Jews*, 121; 3 Universal Jewish Encyclopedia 631.

[38] Margolis and Marx, *History of the Jewish People*, 210-211; Roth, *Jewish Contribution to Civilization*, 43.

[39] See *supra*, note 34; V Jewish Encyclopedia 43. The extent to which universal education had spread among the Jewish people by the fourth century is indicated by the following question and answer appearing in *Tractate Shebuoth* (Babylonian Talmud) 5a: "Is it possible to find anyone without elementary school knowledge?" "Yes, it is possible in the case of a child who was taken captive among idol worshippers."

[40] Cf. Konvitz, "Law Restricting Teaching of Foreign Languages Held Unconstitutional", Common Ground, Winter 1949: "Before Pearl Harbor there were in Hawaii large schools teaching the Chinese and Japanese languages in the afternoon, after the regular schools had adjourned—a pattern followed in the continental United States by the Jewish schools known as Talmud Torahs. It was these language schools that the act was intended to reach."

Hawaii. It may safely be assumed that a significant Jewish community exists in Hawaii, and in the light of the express commands of the Jewish religion, it may be equally assumed that Jewish religious schools are conducted (as indeed is the case [41]), at least within the all-embracing definition of the Hawaiian statute.[42]

In any event, this statute and similar ones restrict the liberties of all religious denominations. Under this statute, no Catholic preparing for the priesthood could legally learn the Latin necessary for the performance of his priestly functions until he attained the age of ten, and many might not until they reach fifteen (R. 85). The Court below pointed out that the statute "would apply to a religious Chinese descended mother having an educated cousin teach two of her children in her home the truths of Confucius, even orally, explaining the words of that spiritual guide in the language in which they are spoken and recorded" (R. 80). The prosecution in the *Meyer* case was based on the use in the parochial school conducted by the Zion Evangelical Lutheran Congregation of a collection of Biblical stories written in German.[43] In *Bartels* v. *Iowa*,[44] too, the defendants were teachers in a Lutheran Evangelical Congregational school.[45] Thus, the Jewish religion is not the only one restricted by anti-foreign language statutes.

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[41] We are informed by letter from Rabbi Emanuel Kumin, Territorial Director of the National Jewish Welfare Board for Hawaii, that there is a substantial Jewish community in Honolulu which maintains a congregation and a religious school, and that Jewish children of public school age regularly attend the religious school on Sunday mornings and two afternoons during the week.

[42] ". . . any person . . . [who] teaches, with or without fees, . . . two or more persons as a group. . . ." Section 2.

[43] 262 U. S. 390, 397 (1923).

[44] 262 U. S. 404 (1923).

[45] *Ibid.*, p. 409.

2. A restriction of religious liberty is constitutionally justifiable only if clearly and immediately necessary to protect an interest more important to democratic society than the unrestricted exercise of religion.

There can, of course, be no doubt that the religious freedom guaranteed by the First Amendment does not embrace absolute "freedom to act" and that all conduct "remains subject to regulation for the protection of society".[46] Concededly, the First Amendment does not preclude proscription of polygamy,[47] breaching the peace,[48] or child labor,[49] and we need not deny that engaging in religious teaching may be such conduct and thus subject to governmental regulation.[50] Nevertheless, the usual presumption of constitutionality supporting legislation is balanced, in legislation regulating rights secured by the First Amendment, by "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment".[51] Hence, "any attempt to restrict these liberties must be justified by clear public interest,

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[46] *Cantwell* v. *Connecticut*, 310 U. S. 296, 303-304 (1940).

[47] *Reynolds* v. *United States*, 98 U. S. 145 (1878); *Davis* v. *Beason*, 133 U. S. 333 (1890).

[48] *Chaplinsky* v. *New Hampshire*, 315 U. S. 568 (1942).

[49] *Prince* v. *Massachusetts*, 321 U. S. 158 (1944).

[50] Cf. *Musser* v. *Utah*, 333 U. S. 95 (1948).

[51] *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). While this case deals with freedom of speech and of assembly; its principles are certainly not less applicable to freedom of religion. Cf. *Marsh* v. *Alabama*, 326 U. S. 501, 509 (1946). Indeed, in the *Thomas* case the Court based its argument on the freedom of religion aspect of the First Amendment, stating: "This conjunction of liberties is not peculiar to religious activity and institutions alone. The First Amendment gives freedom of mind the same security as freedom of conscience." *Id.* 531. And in *Prince* v. *Massachusetts*, 321 U. S. 158, 164 (1944), the Court "doubted" that "freedom of conscience is entitled to a *broader* protection" than "freedom of the mind", and indicated its opinion that all "the great liberties insured by the First Article . . . have a preferred position in our basic scheme".

threatened not doubtfully or remotely, but by clear and present danger".[52]

It is not sufficient to establish that a clear and immediate danger exists. It must be established with equal clarity that the restriction imposed upon the rights guaranteed by the First Amendment is necessary to meet the danger. Ordinarily, if a situation exists requiring legislative action, it is for the legislature and not the courts to determine the appropriateness of a proposed remedy, and the courts may not interfere unless the legislature's act was patently unreasonable.[53] But for legislation abridging a liberty secured by the First Amendment, a sterner test is imposed. "The rational connection between the remedy provided and the evil to be curbed, which in other contexts might support legislation against attack on due process grounds, will not suffice."[54]

Finally, even if a clear and present danger to an interest which the legislature has a right to protect is shown to exist, a restriction on a right secured by the First Amendment is constitutionally justified only if the interest sought to be protected is more important to American democracy than the unrestricted exercise of religion. "Only the gravest abuses, endangering paramount interests, give occasion for permissible limitations."[55] Exercise of the rights secured by the First Amendment "lies at the foundation of free government by free men. . . . Mere legislative

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[52] *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). See also *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943).

[53] *United States* v. *Carolene Products*, 304 U. S. 144 (1938).

[54] *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945). See also, *Thornhill* v. *Alabama*, 310 U. S. 88, 95-96 (1940): "Mere legislative preference for one rather than another means for combatting substantive evils, therefore, may well prove an inadequate foundation on which to rest regulations which are aimed at or in their operation diminish the effective exercise of rights so necessary to the maintenance of democratic institutions." See also, *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624, 639 (1943).

[55] *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945).

preferences or beliefs respecting matters of public convenience may well support regulation directed at other personal activities, but be insufficient to justify such as diminishes the exercise of rights so vital to the maintenance of democratic institutions." [56]

Measured by any of these tests, we submit, the Hawaiian statute fails. First: There is no evidence of the required clarity that the danger purportedly legislated against actually exists. Second: It has not been satisfactorily established that the legislation is necessary or appropriate to meet the danger. Third: The danger legislated against is less serious than the restriction on religious liberty imposed by the statute.

3. The Hawaiian statute is not clearly and immediately necessary to protect an interest more important to democratic society than the unrestricted exercise of religion.

a. THE EXISTENCE OF A DANGER

The Hawaiian legislature purported to find and declared that "the study and persistent use of foreign languages by children of average intelligence in their early and formative years definitely detract from their ability to understand and assimilate their normal studies in the English language . . . retard their progress in understanding and assimilating such studies; . . . [and] may and do in many cases cause serious emotional disturbances, conflicts and maladjustments. . . ." [57]

This Court, of course, is not bound by these findings. It can and must determine for itself whether these dangers actually exist. If it were otherwise, violation of the basic guarantees of the First Amendment could be accomplished by the simple expedient of "finding" that a sufficiently grave danger exists.[58]

Considering the two findings in inverse order, the extensive literature on the subject reveals no real evidence to support the finding that bilingualism may and does "cause

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[56] *Schneider* v. *State of New Jersey*, 308 U. S. 147, 161, (1939)

[57] Section 1 (Ch. 31, Sec. 1871).

[58] *United States* v. *Carolene Products*, 304 U. S. 144, 152 (1938)

serious emotional disturbances, conflicts and maladjustments". One investigator did find a difference in the extent of emotional maladjustment between bilingual and monoglot college students, but she did not conclude that bilingualism was the *cause* of the greater maladjustment; what she found was that both the bilingualism and the maladjustment were the effect or symbol of the environmental factors converging upon "second generation" Americans.[59] Indeed, the maladjustment seems to be an incident of the widening cultural gap between first and second generation Americans[60]—a gap which bilingualism actually helps to bridge.

Nor have we been able to find any scientific evidence that bilingualism causes intellectual retardation. Seth Arsenian, after studying the voluminous literature on the subject and the results of nearly one hundred investigations in this country, found that: "Bilingual children as compared with monoglot children of the same age and environment are neither retarded nor accelerated in their mental development."[61]

Another investigator divided one hundred ten-year old Jewish girls into four groups according to the amount of Yiddish spoken in the home, and tested them on the Stan-

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[59] Spoerl, *Bilinguality and Emotional Adjustment*, 38 Journal of Abnormal Psychology (1943), 37, 57. Dr. Spoerl summarized his findings as follows: "Our conclusion, then, is that the emotional maladjustment of the bilingual student insofar as it expresses itself in terms of family disharmony is a result of the culture conflict to which the native-born children of immigrants is subjected. . . . Thus it is that bilingualism enters into the situation, not in its intra-personal aspects, but rather as a symbol of the environmental factors converging upon the 'second generation'. *Most of the emotional maladjustment of the bilingual student is environmentally determined and is not the result of mental conflict engendered by the complexities of thinking or speaking in two languages.*" (Emphasis added.)

See also, Arsenian, *Bilingualism in the Post-War World*, 40 Psychological Bulletin (1945) 65, 86.

[60] McWilliams, *Brothers under the Skin*, 104-105.

[61] Arsenian, *supra*, note 59.

ford Binet test (a verbal test) and the Pintner Paterson Performance test. Group I came from homes in which only English was spoken; Groups II and III were intermediate and Group IV heard only Yiddish in their home. No significant differences on intelligence test scores of either test were found, indicating that bilingualism among these Jewish girls did not retard either their mental or verbal development.[62]

A careful, intensive study of 469 sixth and seventh grade Jewish children was conducted by Pintner and Arsenian, who reached the following conclusions:

> "On the basis of these results, it is apparent that insofar as this population and the tests used (Pintner intelligence test and Pintner non-language intelligence test) are concerned, the association between bilingualism and intelligence is practically zero and the differences in I. Q. on both tests (verbal and performance) of high and low bilingual groups are statistically insignificant.
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> "High and low bilingual groups of boys and girls equated on socio-economic status were compared as to their performance on these same intelligence tests and no statistically significant differences were found. It is concluded that bilingualism in this particular population (Jewish) bears no relation to verbal intelligence and school adjustment as measured by the tests employed."[63]

We submit, therefore, that there is no substantial evidence that bilingualism causes either emotional malad-

[62] Halpern, F. C., Intelligence of Bilingual Jewish Girls as Measured by the Stanford Binet Test and Pintner Paterson Performance Test, Unpublished Thesis, Columbia University, Library.

[63] Pintner and Arsenian, *The Relation of Bilingualism to Verbal Intelligence and School Adjustment*, 31 Journal of Educational Research, 255, 263. It should be pointed out that in this study an effort was made to determine the effects of bilingualism on school adjustment as measured by a separate test for the purpose, namely, the pupil portraits test, form A. In this area, as well as in intelligence, there were no significant effects to be attributed to bilingualism.

justment or retardation of mental achievement. There is, we concede, some evidence that bilingualism may in some cases have a retarding effect on language development and school achievement.[64] But even here the evidence is far from being so clear as to justify restriction of a right guaranteed by the First Amendment. Thus, several hundred Jewish boys and girls in the third and fourth grades of public school were divided into two categories, "mostly English-speaking" and "mostly Yiddish-speaking" backgrounds, and received vocabulary, analogies, sentence completion and reading tests. No reliable differences between the two groups were found. The experimenter, Schiller, concluded that it is obvious that these Jewish children are not penalized on English verbal tests by being subjected to a greater amount of non-English speech.[65]

Symonds, who studied attendance at Chinese language schools in Honolulu on English lingual ability, reached the following conclusion:

> ". . . the effect of the Chinese language school on the English ability of its students is so small as to be negligible. . . . Taking Chinese children as you find them, they are not noticeably retarded in English because of attending foreign language schools."[66]

Others, too, have found no significant difference between bilingual and monoglot children. Indeed, in some instances bilingual children were found to possess a larger English vocabulary than the monoglots.[67] But even those who find measurable retardation in language development properly attributable to bilingualism agree that the retardation is

[64] See, e.g., Testimony of Dr. M. E. Smith, R. 404-406.

[65] Schiller, *Verbal, Numerical, and Spatial Abilities of Yuma Children*, Archives of Psychology, No. 161.

[66] The Effect of Attendance at Chinese Language Schools on Ability with the English Language, 8 Journal of Applied Psychology, 411, 441 (1924).

[67] Arsenian, *supra*, note 59.

dissipated as the child's educational development advances."[68]

We submit, therefore, that evidence to support a finding that bilingualism causes retardation or maladjustment lacks by far the clarity and cogency required to justify legislative restriction on the free exercise of religion.

b. The appropriateness of the remedy

Even if bilingualism does bring with it some retardation in school achievement, the restriction on religious liberty imposed by the Hawaiian legislature has not been shown to be clearly necessary or appropriate to meet the evil. As the Court below pointed out, it is incumbent neither upon those who attack the statute nor upon the courts to suggest legislative means of combatting the evil within constitutional limitations; that is the responsibility of the legislature. The Hawaiian statute cannot stand if it is not clearly established that it is an appropriate and necessary measure to meet the evil at which it is aimed.[69]

We do not believe that the Hawaiian legislature has established with the clarity required to justify restraints on religious liberty that achievement retardation can be met only by outlawing foreign language schools for all children under ten years and for at least half of them between ten and fifteen.

The scientific evidence which we have discussed may indicate a measurable relationship between bilingualism and retardation in verbal development but the statute here in issue does not proscribe bilingualism; it outlaws foreign language schools. Bilingualism is generally acquired not

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[68] Terman found that for the bilingual student, vocabulary is lower than mental age up to the third or fourth grade, but after twelve years of age, vocabulary is equal to mental age. *The Vocabulary Test as a Measure of Intelligence*, 9 Journal of Educational Psychology 452-466 (1918). See also: Decroly, *Essai d'application du test de Ballard dans les ecoles Belges*, 27 Annee Psychologique 59-93 (1926); Saer, *An Inquiry into the Effect of Bilingualism upon the Intelligence of Young Children*, 6 Journal of Experimental Pedagogy 232-240, 266-274 (1922).

[69] See notes 54, 56, *supra*.

by reason of attendance at a foreign-language school but because a second language is spoken at home. The retardation that results may therefore be well attributable not to the acquisition of a second language but to the unpedogogical method through which it was acquired or to the fact that it was acquired before the primary language.

That bilingual instruction in schools does not necessarily have a retardative effect is supported by substantial scientific authority. A committee appointed to inquire into the conditions of schools attended by French-speaking pupils in Canada found that "proficiency in the use of one language is assuredly no barrier to securing equal proficiency in the other if proper methods of organization and instruction are followed."[70]

Most significant is the experiment conducted by M. E. T. Logie, the director of a school in the Union of South Africa, by special permission of his government. The pupils in his school were given bilingual instruction, the same lesson being taught in Afrikaans and then recited in English, or vice-versa; the same teacher taught the subject in both languages without favoring either one or the other. Children playing games were carefully mixed rather than divided into linguistic groups, so that the affective as well as the purely language learning factors were constant for the two language groups. After four years of this experience the children were tested as to their knowledge of both the mother tongue and of the second language and also as to their proficiency in arithmetic (this subject being selected as a test for logical thinking) and geography. The results of these tests were compared with the results of the same tests taken by pupils in unilingual English and Afrikaans schools. *On none of the tests were the bilinguals shown to be inferior to their unilingual contemporaries.*[71] This experiment, more crucial than any others, shows that bilin-

[70] Report of Committee Appointed to Inquire into the Condition of the Schools Attended by French Speaking Pupils, Canada. Department of Education (1927).

[71] Bovet: *Les Problems scolaires poses par le bilinguisme.* Pour l'Ere Nouvelle, No. 105, Feb., 1935.

gualism per se need not cause retardation even in the elementary school.[72]

We submit, therefore, that even if any school achievement retardation can properly be attributed to bilingualism, it has not been clearly established that an absolute prohibition of foreign language schools for all children under ten is a necessary or appropriate means to remedy the evil.

c. The gravity of the danger

Even if some retardation in school achievement were an inevitable consequence of bilingualism and could only be avoided by prohibiting foreign language schools, the Hawaiian law would be invalid since unrestricted exercise of religious liberty is more important to American constitutional democracy than the avoidance of such retardation.

In "adjudicating the clash of freedoms which the Bill of Rights was designed to resolve—the freedom of the community to regulate its life and the freedom of the individual to exercise his religion",[73] this Court must give due recognition to "the preferred place given in our scheme to the great, the indispensable democratic freedoms secured by the First Amendment."[74] These "liberties possess a sanctity and a sanction not permitting dubious intrusions".[75]

This Court has been diligent in protecting the religious liberty secured by the First Amendment. Interests which the state would seem to have a clear right to protect have been held subordinate. Governmental power to prevent fraud,[76] preserve cleanliness of streets,[77] regulate highway

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[72] Arsenian, *supra*, note 59.

[73] Mr. Justice Frankfurter concurring in *Marsh* v. *Alabama*, 326 U. S. 501, 511 (1946).

[74] *Thomas* v. *Collins*, 323 U. S. 516, 530 (1945).

[75] *Ibid.*

[76] *United States* v. *Ballard*, 322 U. S. 78 (1944); *Schneider* v. *New Jersey*, 308 U. S. 147 (1939).

[77] *Schneider* v. *New Jersey*, 308 U. S. 147 (1939); *Martin* v. *Struthers*, 319 U. S. 141 (1943).

traffic,[78] raise revenue [79] and require overt manifestations of loyalty [80] are all subject to restriction when their exercise interferes with religious liberty. Even the rights of an owner to determine who shall enter upon his property may be subordinate to the free exercise of religion.[81]

Governmental interference with the upbringing of children has been consistently invalidated by this Court.[82] Only a grave danger to the physical health of the public [83] or of children [84] justifies legislative restraint upon "the right . . . to bring up children" [85] and "high duty . . . to prepare [them] for additional obligation".[86]

Even if there were substantial evidence that bilingualism is responsible for some school retardation and emotional maladjustment, and an inference could be drawn (unsupported by any evidence) that prohibition of foreign language schools for the young would eliminate bilingualism, governmental interference with the religious liberty of parent and child would not therefore be constitutionally justified. Exercise of religion, particularly a minority or unpopular religion, is likely to entail some material sacrifice.

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[78] *Cantwell* v. *Connecticut*, 310 U. S. 296 (1940).

[79] *Murdock* v. *Pennsylvania*, 319 U. S. 105 (1943); *Follett* v. *McCormick*, 321 U. S. 573 (1944).

[80] *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

[81] *Marsh* v. *Alabama*, 326 U. S. 501 (1946).

[82] *Meyer* v. *Nebraska*, 262 U. S. 390 (1923); *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925); *Bartels* v. *Iowa*, 262 U. S. 404 (1923); *Farrington* v. *Tokushige*, 273 U. S. 284 (1927); *West Virginia State Board of Education* v. *Barnette*, 319 U. S. 624 (1943).

[83] *Jacobson* v. *Massachusetts*, 197 U. S. 11 (1905) (compulsory vaccination statute).

[84] *Prince* v. *Massachusetts*, 321 U. S. 158 (1944) (child labor law).

[85] *Meyer* v. *Nebraska*, 262 U. S. 390 (1923).

[86] *Pierce* v. *Society of Sisters*, 268 U. S. 510 (1925).

Undoubtedly the State has power, as *parens patriae*, to promote the welfare of children; but that power does not include the right to compel parent and child to elect the temporal to the exclusion of the eternal. The secular education obtained by children at a state conducted public school may be superior, measured by mundane standards, than the education obtained at many parochial schools, but would a legislative finding to that effect have resulted in a contrary decision in the *Pierce* case? Any emotional maladjustment which might be attributable to bilingualism is insignificant compared to that suffered by an eight or nine year old Jehovah's Witness who alone in his school refuses to salute the American flag. Would a legislative finding to that effect have resulted in a contrary decision in the *Barnette* case? If the legislature were to find that some sectarian teaching has a damaging effect upon the emotional and intellectual development of children,[87] would that fact justify censorship of religious teaching? Obviously, legislative power to promote the welfare of children is circumscribed by the boundaries of the First Amendment.

POINT II

The real purpose of the Hawaiian statute, to achieve a monolithic nationalism by coercion, being inconsistent with our national policy, does not justify interference with the free exercise of religion.

1. The real purpose of the Hawaiian statute.

We believe that the Hawaiian statute is but another in the long and tragic history of futile attempts to achieve cultural monism by outlawing minority languages.

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[87] Cf. Moehlmann, *School and Church: The American Way*, 92-93; Thayer, *Religion in Public Education*, 27; Moehlmann, *The Church as Educator*, ch. 5; Beckes, *Weekday Religious Education; Help or Hindrance to Inter-Religious Understanding*, National Conference of Christians and Jews, Human Relations Pamphlet No. 6 (1946).

The term "genocide" has been created to describe the destruction of a nation or an ethnic group,[88] and "cultural genocide" the destruction of its cultural patterns.[89]

Attempts to destroy a minority group's cultural pattern by forbidding the use or teaching of its language have been numerous and uniformly futile.[90] Alsatian resistance to German attempts to outlaw French teaching after 1870[91] has been immortalized in Alphonse Daudet's classical story "The Last Lesson". Both Prussia and Czarist Russia attempted to stamp out Polish by forbidding its teaching in the schools.[92] The Austro-Hungarian government promulgated numerous decrees seeking to eliminate from the Empire languages other than German or Hungarian.[93] After the First World War, Italy attempted to wipe out German from the territory acquired from Austria,[94] and Nazi Germany forbade use of the local language in schools in areas incorporated into the Greater Reich.[95]

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[88] Lemkin, *Axis Rule in Occupied Europe*, 79.

[89] *Ibid.*, p. 84.

[90] 9 Encyclopedia of Social Sciences 167; Schlauch, *The Gift of Tongues*, 280; Hayes, *Essays in Nationalism*, pp. 239-240: "Many have been the attempts to compel dissident nationalities to conform to the nationalism of the dominant majority. Germans between 1871 and 1914 pursued fairly systematically a policy of Germanizing dissentent Poles, Danes and Alsatians; they forced the use of the German language in the schools and even in religious instruction. . . . This 'Germanisation' or 'Prussianisation' was paralled in other countries by a 'Russification,' 'Magyarisation,' 'Ottomanisation', etc.: and the 'Americanisation' which has recently been much in evidence in the United States, if not employing all the methods of 'Prussianisation,' sets itself a familiar goal."

[91] The Germans prohibited use of the French language not only in schools, but even on gravestones. Hazen, *Alsace-Lorraine under German Rule*, pp. 172-173; LeBlanc, La Liberte d'Enseignement en Alsace et Lorraine; p. 101.

[92] 9 Encyclopedia of Social Sciences 167; Tims, *Germanizing Russian Poland*, p. 78.

[93] *Ibid.*

[94] *Ibid.*

[95] Lemkin, *supra*, note 88, p. 84; Jacoby, *Racial State*, 150

In the United States, legislative attempts to restrict the use or teaching of minority languages have always been motivated by antagonism to ethnic minorities. The statutes invalidated in the *Meyer* and *Bartels* cases were purportedly enacted because the

> ". . . legislature had seen the baneful effects of permitting foreigners, who had taken residence in this country, to rear and educate their children in the language of their native land. The result of that condition was found to be inimical to our own safety. To allow the children of foreigners, who had emigrated here, to be taught from early childhood the language of the country of their parents was to rear them with that language as their mother tongue. It was to educate them so that they must always think in that language, and, as a consequence, naturally inculcate in them the ideas and sentiments foreign to the best interests of this country."[96]

The avowed purpose of the anti-parochial school law invalidated in the *Pierce* case was to

> ". . . encourage the patriotism of . . . citizens, and train . . . younger citizens to become more willing and more efficient defenders of the United States in times of public danger."[97]

The State of Oregon argued in support of the statute that

> ". . . if the Oregon School Law is declared unconstitutional there will be nothing to prevent the establishment of private schools, the main purpose of which will be to teach disloyalty to the United States, or at least the moral duty to refuse to aid the United States even in case of a defensive war."[98]

Similarly, the "declared object" of the earlier Hawaiian statute held unconstitutional in *Farrington* v. *Tokushige*

[96] *Meyer* v. *State*, 107 Neb. 657 (1922). See also: *Nebraska District of Evangelical Synod* v. *McKelvie*, 104 Neb. 93 (1919); *Bartels* v. *State*, 191 Ia. 1060 (1921); *Pohl* v. *State*, 102 Ohio St. 474 (1922).

[97] *Pierce* v. *Society of Sisters*, 268 U. S. 510, 528 (1925).

[98] *Ibid.*

was to regulate foreign language schools "in order that the Americanism of the pupils may be promoted".[99]

It is significant that these statutes were all enacted during the period immediately following the First World War,[100] marked by intense nationalism and xenophobia,[101] culminating in the exclusionary National Origins Immigration Act of 1924.[102] The statute involved in the present case was also enacted in the period of intense nationalism, suspicion of foreigners, particularly Japanese,[103] and general hysteria, which followed Pearl Harbor.[104] We submit that the motivations and purpose underlying the present statute were the same as those underlying the previous American statutes and which underlie anti-foreign language laws generally.[105]

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[99] 273 U. S. 284, 293 (1927).

[100] The Nebraska, Iowa and Ohio statutes were enacted in 1919. The Hawaiian law was enacted in 1920.

[101] Hayes, *supra*, note 90; Davie, *World Immigration*; Allen, *Only Yesterday*, Ch. 3.

[102] 43 Stat. 153.

[103] Cf. *Hirabyashi* v. *United States*, 320 U. S. 81 (1943); *Korematsu* v. *United States*, 323 U. S. 214 (1944); *Ex parte Endo*, 323 U. S. 283 (1944); See also Konvitz, *The Alien and Asiatic in American Law*, chap. 11; McWilliams, *Brothers under the Skin*, chap. IV.

[104] The Japanese language schools were closed and the statute enacted during the period of martial law in Hawaii following Pearl Harbor. R. 34.

[105] During the height of the anti-Japanese hysteria in California, the State Senate appointed a legislative committee on Japanese Resettlement. The Committee "vigorously opposed . . . the return of any Japanese to California until after the end of the war with Japan," and recommended the strengthening of the Alien Land Laws [practically invalidated in *Oyama* v. *California*, 332 U. S. 633 (1948)] and the Anti-Japanese Fishing Laws [invalidated in *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948)], and *the regulation of Japanese language schools.*" Report of California Senate Fact Finding Committee on Japanese Resettlement, May 1, 1945.

Even zoning laws have been employed to achieve cultural uniformity. At Mt. Kisco, N. Y., the application of a former famous European Talmudic college to conduct a vocational training school in connection with its seminary was granted on condition that English become the language of secular instruction. N. Y. Times, November 27, 1948 (editorial page).

2. The expressed purpose of the Hawaiian statute.

The expressed purpose of the law is to prevent the educational retardation and emotional disturbance which presumably results from attendance at foreign language schools. We submit, however, that this Court is not bound by the legislative declaration of purpose and must determine the constitutionality of the law in the light of its true purpose.[106] This Court has never considered itself under any disability which prevents it from looking beyond the formally declared statutory purpose in order to perceive those factors which, in reality, constitute the legislative motive.[107] There would be little left of the constitutional

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[106] *Meyer* v. *Nebraska*, 262 U. S. 390, 399-400 (1923): "The established doctrine is that this liberty may not be interfered with, under the guise of protecting the public interest, by legislative action which is arbitrary or without reasonable relation to some purpose within the competency of the State to effect. Determination by the legislature of what constitutes proper exercise of police power is not final or conclusive but is subject to supervision by the Courts."

[107] *Muggler* v. *Kansas*, 123 U. S. 623, 661 (1887):

> "The courts are not bound by mere forms, nor are they to be misled by mere pretenses. They are at liberty—indeed under a solemn duty—to look at the substance of things, whenever they enter upon the inquiry whether the legislature has transcended the limits of its authority. If, therefore, a statute purporting to have been enacted to protect the public health, the public morals, or the public safety, has no real or substantial relation to those objects, or is a palpable invasion of rights secured by the fundamental law, it is the duty of the courts to so adjudge, and thereby give effect to the Constitution."

See also *Fairbank* v. *United States*, 181 U. S. 283 (1901); *Child Labor Tax Case*, 259 U. S. 20 (1922). See also concurring opinion of Mr. Justice Murphy in *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410, 427 (1948) (invalidating statute whose expressed purpose was fish conservation):

> "We should not blink at the fact that § 990, as now written, is a discriminatory piece of legislation having no relation, whatever, to any constitutionally cognizable interest of California. It was drawn against a background of racial and economic tension. It is directed in spirit and in effect solely against aliens of Japanese birth. It denies them commercial fishing rights not because they threaten the success of any conservation program,

liberties secured by the First Amendment if a legislative declaration of a permissible purpose stopped judicial inquiry into the reality of the situation.

The fact that the absolute ban is limited to children below ten years of age does not negate our contention that the dominant purpose of the legislation was to promote cultural uniformity and nationalist loyalty rather than prevent educational retardation. Anti-foreign language statutes whose expressed purpose is to promote nationalism are generally limited to children in elementary schools. The Nebraska, Iowa and Ohio statutes invalidated in the *Meyer* and *Bartels* cases prohibited foreign language instruction to children who had not yet attained the eighth grade in elementary school.[108] The Hawaiian statute declared invalid in the *Farrington* case prohibited attendance by children who had not passed the second grade.[109] The order concerning the use of the German language in Luxembourg, issued by the Nazi gauleiter permitted use of the French language in post-elementary schools.[110] Under the statute here in issue, the permissive point is the fourth grade for half the children and the fifteenth year for the other half. The substance, however, is not different.

The change in the legislative findings and expressed purpose was clearly motivated by a desire on the part of the Hawaiian legislature to circumvent the decisions in the *Meyer*, *Bartels*, *Pierce* and *Farrington* cases. Such change in form without change in substance follows what has be-

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not because their fishing activities constitute a clear and present danger to the welfare of California, or of the nation, but only because they are of Japanese stock, a stock which has had the misfortune to arouse antagonism among certain powerful interests."

[108] 262 U. S. 390, 397 (1923); 262 U. S. 404, 409-411 (1923).

[109] 273 U. S. 284, 294 (1927).

[110] The order provided: "The language of instruction in all chools shall be exclusively German. In primary schools the French language shall no longer be taught as a subject of instruction; in secondary schools courses in the French language shall continue to be given". Lemkin, *Axis Rule in Occupied Europe*, p. 440.

come the usual pattern in legislative action discriminating against minority racial or religious groups. Legislatures have shown imagination and ingenuity in devising new forms seeking to evade decisions of this Court prohibiting racial zoning,[111] excluding Negroes from primary elections,[112] furnishing Negroes with inferior educational facilities,[113] and restricting economic opportunities of Japanese.[114] These attempts to disguise the true purpose of discriminatory legislation have consistently failed. We do not believe the present attempt will be more successful.

3. Cultural genocide and national policy.

Cultural genocide, and particularly that aspect which involves elimination of minority languages is antagonistic to American national policy. The treaties which terminated the First World War all contained specific provisions guaranteeing the right of minority ethnic groups to conduct primary schools in their own language.[115] While these

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[111] *Buchanan* v. *Warley*, 245 U. S. 60 (1917); *Harmon* v. *Tyler*, 273 U. S. 668 (1927); *Richmond* v. *Deans*, 281 U. S. 704 (1930).

[112] *Nixon* v. *Herndon*, 273 U. S. 536 (1927); *Grovey* v. *Townsend*, 295 U. S. 45 (1935); *United States* v. *Classic*, 313 U. S. 299 (1941); *Smith* v. *Allwright*, 321 U. S. 649 (1944).

[113] *Plessy* v. *Ferguson*, 163 U. S. 537 (1896); *Missouri ex rel. Gaines* v. *Canada*, 305 U. S. 337 (1938); *Sipuel* v. *Board of Regents*, 332 U. S. 631 (1948).

[114] *Yick Wo* v. *Hopkins*, 118 U. S. 356 (1886); *Oyama* v. *California*, 332 U. S. 633 (1948); *Takahashi* v. *Fish and Game Commission*, 334 U. S. 410 (1948).

[115] Robinson, *Were the Minorities Treaties a Failure?* 37-38. See, e.g., Treaty with Poland (Versailles, June 28, 1919), Article 9: "Poland will provide in the public educational system in towns and districts in which a considerable proportion of Polish nationals of other than Polish speech are residents adequate facilities for ensuring that, in the primary schools, the instruction shall be given the children of such Polish nationals through the medium of their language. This provision shall not prevent the Polish Government from making the teaching of the Polish language obligatory in the said schools." The official texts of the relevant provisions can be found in Protection of Linguistic, Racial and Religious Minorities by the League of Nations, Publication of League of Nations, 1927.

treaties failed of ratification by the United States Senate, there can be no doubt that these provisions for protection of minority rights represented the American national policy.[116] Indeed, "in some instances the articles are almost verbatim abstracts from the classical documents of individual and national emancipation, such as the English Bill of Rights, the American Declaration of Independence, the Preamble and Amendments 1, 4, 5, 14 (Section 1) and 15 of the United States Constitution, and the Declaration of the Rights of Man of the French Revolution".[117]

Treaties and international conventions which have been ratified by the United States Senate and are part of our international law reflect our national policy against cultural genocide and the destruction of minority languages. The American-British Palestine Mandate Convention of 1924[118] guarantees the right of each ethnic "community to maintain its own schools for the education of its own members in its own language, while conforming to . . . educational requirements of a general nature".[119] The Resolution of the United Nations General Assembly, the adoption of which was largely the result of American efforts, reiterated this guaranty and required its adoption as a part of the constitutional law of the proposed Israeli and Arab states.[120]

As was pointed out in the *Pierce* case, "the fundamental theory of liberty upon which all government in this Union reposes excludes any general power of the State to stan-

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[116] 10 Encyclopedia of Social Sciences, 520.

[117] Robinson, *supra*, note 115, p. 39.

[118] Ratified by the Senate, Feb. 20, 1925.

[119] Article 15, Publications of the Department of State, Near Eastern Series No. 1, Publication No. 153, p. 110.

[120] November 29, 1947, Chapter 2, section 6. "The right of each community to maintain its own schools for the education of its own members in its own language, while conforming to such educational requirements of a general nature as the State may impose, shall not be denied or impaired."

dardize its children" by prohibiting exposure to diverse educational experiences.[121] This principle has been adopted by the United Nations General Assembly and incorporated into its Universal Declaration of Human Rights, in whose formulation and adoption the United States delegation played a substantial part.[122]

4. Coerced uniformity and religious liberty.

In the light of these expressions of American policy, it is clear that coerced cultural uniformity is not more important to American democracy than the exercise of the rights guaranteed by the First Amendment. This Court has repeatedly held that the "desire of the legislature to foster a homogeneous people with American ideals" does not justify restriction of the personal liberties secured by the Constitution.[123]

There was a time when many Americans believed that the welfare of our country demanded the elimination of cultural differences. Homogeneity was the goal and would-be immigrants were welcomed or excluded in accordance with unproved assumptions of their assimilability.[124] Americanization meant standardization and uniformity. People who boasted of being 100% American were looked upon with favor, while "hyphenated Americans" were in disrepute.[125] The anti-foreign language statutes which

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[121] 268 U. S. 510, 535 (1925).

[122] Article 26, par. 3: "Parents have a prior right to choose the kind of education that shall be given to their children." N. Y. Times, December 7, 1948, p. 13.

[123] *Meyer v. Nebraska*, 262 U. S. 390, 402 (1923); *Bartels v. Iowa*, 262 U. S. 404 (1923); *Farrington v. Tokushige*, 273 U. S. 284 (1927).

[124] Immigration Commission Reports, Sen. Doc. 758, 61st Cong., 3rd Sess. (1911); Hearings before House Committee on Immigration, 67th Cong., 3rd Sess. (Nov. 21, 1922), p. 279, *et seq.*; House Report 350, Part 2, 68th Cong., 1st Sess. (1924); Davie, *World Immigration*.

[125] Hayes, *supra*, note 90.

have previously been invalidated by this Court were a product of that era.[126]

We have, we believe, outgrown that adolescent period of chauvinistic culturalism.[127] We have reached the stage of national maturity and accept the concept of cultural democracy according to which all groups "majority and minority alike [have] the right to be different and the responsibility to make sure that their differences do not conflict with the welfare of the American people as a whole".[128] We have begun to realize that we are a people of peoples, whose strength lies in diversity.

For these reasons we believe that legislation seeking to destroy cultural differences in American life is inconsistent with enlightened American policy. We do not contend that legislation seeking that end through voluntary measures would be unconstitutional. We do submit, however, that legislation seeking to attain that end through coercion is unconstitutional, at least where the legislation restricts the free exercise of religion.[129]

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[126] The Oregon statute invalidated in the *Pierce* case was enacted as result of Ku Klux Klan control of the State's political machinery. Myers, *History of Bigotry in the United States*, 293.

[127] Young, *American Minority Problems*, 460.

[128] Cole and Vickery, *Intercultural Education in American Schools*, p. 50. See also authorities cited *supra*, note 6.

[129] It is doubtful that elimination of bilingualism and foreign language schools is necessary or even an aid to the assimilation and cultural uniformity. Young, *American Minority Peoples*, 465-466. The effectiveness of compulsion as a method of Americanization is even more doubtful. *Ibid.*, p. 459. It might therefore be urged that the means adopted by the Hawaiian legislature are not so clearly necessary and appropriate to achieve the end of uniformity to justify restriction of religious liberty. We have preferred, however, to limit our discussion to the validity of the end rather than the appropriateness of the means.

This principle has been stated eloquently by this Court in striking down a law requiring manifestations of national loyalty by saluting the flag:

> "National unity as an end which officials may foster by persuasion and example is not in question. The problem is whether under our Constitution compulsion as here employed is a permissible means for its achievement.
>
> Struggles to coerce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as by evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, support of a dynasty or regime, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to an ever-increasing severity.
>
> As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.
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> It seems trite but necessary to say that the First Amendment to our Constitution was designed to avoid these ends by avoiding these beginnings. . . ." [130]

[130] *West Virginia State Board of Education v. Barnette*, 319 U. S. 624, 640-641 (1943).

Measured by this standard, the Hawaiian statute cannot stand.

Respectfully submitted,

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